

Letter of Findings: 04-20120403
Sales and Use Tax
For Tax Years 2003 and 2004

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ISSUES

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-5-1 et seq; IC § 6-8.1-5-1; IC § 6-8.1-5-4; [45 IAC 2.2-8-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Rhoads v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974).

Taxpayer protests the assessment of sales and use tax on the sales of hay and the purchases of tangible personal property.

II. Tax Administration – Interest.

Authority: IC § 6-8.1-10-1.

Taxpayer protests the imposition of statutory interest.

III. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana resident and a sole proprietor doing business in Indiana. Taxpayer grows and sells hay to customers both in Indiana and outside of Indiana. Taxpayer also operates a trucking business. In addition to delivering goods for unrelated third parties, Taxpayer also uses his trucks to deliver bales of hay to his customers in various states.

In 2006, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records for 2003 and 2004 tax years. Pursuant to the audit, the Department determined that Taxpayer failed to maintain adequate records for the sales of hay. The Department also found that Taxpayer failed to pay sales/use tax on purchases of tangible personal property which Taxpayer used for his business activities. As a result, the Department assessed Taxpayer additional sales and use tax, interest, and penalty based on the best information available ("BIA") at the time of the audit.

Taxpayer protested the assessments. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department's audit assessed Taxpayer additional sales tax on his sales of hay on the ground that Taxpayer failed to maintain adequate records to show that sales tax was collected and remitted to the Department. Nor did Taxpayer collect and maintain properly executed exemption certificates provided by his customers, who claimed statutory exemptions. The Department's audit also assessed additional use tax on Taxpayer's purchases, including supplies, cell phones, as well as trailer and fuel, which Taxpayer used for his business activities in a non-exempt manner and did not pay sales/use tax.

Taxpayer, to the contrary, claimed that he is not responsible for the sales and use tax because the sales and/or the purchases were not subject to sales/use tax.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called the "use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoads v.

Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. *Id.*; *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. *Id.* A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a). Nonetheless, if the property used in Indiana "was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property," the property is "exempt from the use tax." IC § 6-2.5-3-4(a)(1). There are other exemptions available for sales/use tax. IC § 6-2.5-5-1 et seq. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101.

IC § 6-8.1-5-1(b), in relevant part, states "[i]f the department reasonably believes that a person has not reported the proper amount of tax due, the department **shall** make a proposed assessment of the amount of the unpaid tax **on the basis of the best information available** to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest." (**Emphasis added**).

IC § 6-8.1-5-4(a) further provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. **The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.** (**Emphasis added**).

A. Sales Tax on Sales of Hay.

The Department's audit assessed Taxpayer additional sales tax on his sales because Taxpayer did not maintain adequate records to show that he properly collected and remitted sales tax to the Department. Nor did Taxpayer collect and maintain properly executed exemption certificates provided by his customers, who claimed exemptions.

Taxpayer argued that he was not responsible for the sales tax because his customers were farmers.

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. **The retail merchant shall collect the tax as agent for the state.** (**Emphasis added**).

IC § 6-2.5-4-1, in pertinent part, states:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

Accordingly, Taxpayer who sells hay is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax. In this instance, Taxpayer failed to maintain adequate records. The Department's audit thus properly assessed Taxpayer additional sales tax based on the BIA at the time of the audit pursuant to IC § 6-8.1-5-1(b) and IC § 6-8.1-5-4.

At the administrative hearing, Taxpayer asserted that he was not responsible for collecting sales tax on the sales of hay because his customers were farmers who were exempt from sales tax. Taxpayer further stated that he is not required to acquire and maintain any records to support the above assertion because "no one is doing that."

Taxpayer is mistaken. Pursuant to [45 IAC 2.2-8-12\(b\)](#), "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." [45 IAC 2.2-8-12\(d\)](#) also cautions that, "[u]nless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important for the

seller to obtain an exemption certificate in order to avoid the necessity for such proof." Thus, in the absence of the properly signed and properly executed exemption certificates, the Department's audit properly assessed sales tax on the otherwise taxable sales.

Additionally, Taxpayer was afforded ample opportunities to obtain the information, but he declined to contact his customers to obtain the signed and executed exemption certificates. Taxpayer is reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained at the time the transaction occurs otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

In short, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden. Taxpayer's protest of the imposition of the sales tax is denied.

B. Use Tax on Purchases.

The Department's audit assessed additional use tax on Taxpayer's purchases, including supplies, cell phones, trailer, and fuel, which the Department determined Taxpayer was using for his business activities in a non-exempt manner but did not pay sales/use tax. Taxpayer, to the contrary, claimed that he is not responsible for the sales and use tax because the purchases were not subject to sales/use tax.

IC § 6-2.5-3-2 (a) states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

IC § 6-2.5-3-4 provides that:

(a) The storage, use, and consumption of tangible personal property in Indiana is exempt from the use tax if:

- (1) the property was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property; or
- (2) the property was acquired in a transaction that is wholly or partially exempt from the state gross retail tax under any part of [IC 6-2.5-5](#), except [IC 6-2.5-5-24\(b\)](#), and the property is being used, stored, or consumed for the purpose for which it was exempted.

(b) If a person issues a state gross retail or use tax exemption certificate for the acquisition of tangible personal property and subsequently uses, stores, or consumes that property for a nonexempt purpose, then the person shall pay the use tax.

At the hearing, Taxpayer claimed that he was not responsible for the use tax on the purchases. Taxpayer further stated that his business records were destroyed when he moved. Thus, Taxpayer could not and did not have any documentation to support his protest.

Taxpayer is reminded that the Department's proposed assessment is presumed to be correct and Taxpayer bears the burden to prove otherwise. Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met his burden.

In short, Taxpayer's protest of the imposition of use tax is respectfully denied.

FINDING

Taxpayer's protest of the imposition of the sales tax and use tax is denied.

II. Tax Administration – Interest.

DISCUSSION

The Department assessed interest on the tax liabilities. Taxpayer protested the imposition of interest.

IC § 6-8.1-10-1(a) provides, as follows:

If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on the person's return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

Pursuant to IC § 6-8.1-10-1(e), the Department does not have the authority to waive the interest.

FINDING

Taxpayer's protest regarding the imposition of interest is respectfully denied.

III. Tax Administration – Negligence Penalty.

DISCUSSION

The Department's audit imposed a ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or

(5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In this instance, the Department's audit noted that Taxpayer failed to maintain adequate records as required by law. Additionally, during the legal protest process, Taxpayer did not provide any documentation to affirmatively establish that his "failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence." As mentioned above, "[i]gnorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence."

In short, Taxpayer's protest of the imposition of negligence penalty is denied.

FINDING

Taxpayer's protest is denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest of the imposition of sales/use tax is denied. Taxpayer's protest of the imposition of interest is respectfully denied. Taxpayer's protest of the imposition of the negligence penalty is also respectfully denied.

Posted: 11/28/2012 by Legislative Services Agency

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